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Associate General Counsel
815 Sixteenth Street, N.W.
Washington 6, D. C.

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Citations

Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 79

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 695, AFL, et al.,

vs.

VOGT, INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

Interest of the AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

It is submitted by the AFL-CIO because the principle that peaceful picketing in support of union organizing is a part of the "freedom of speech" guaranteed by the First and Fourteenth Amendments is of vital importance to workers and unions; and because in many States that principle is either being denied outright or eroded away by decisions like that of the court below in the present case.

Decisions of the latter sort, while paying lip service to the doctrine that peaceful picketing for lawful objectives is constitutionally protected free speech, are in practice barring all organizational picketing. In each such case the courts infer, from the circumstances of the picketing, some "purpose" or "objective" violative of state law or policy. Usually, the unlawful purpose or objective attributed by the Court to the union is to coerce the employer to coerce the employees to join the union. Usually the court "infers" this unlawful purpose from some particular circumstance of the picketing, such as that the union solicited the employees to join before initiating picketing, or that it failed to solicit them, as the case may be. Whatever the circumstances, the necessary inference of an illegal purpose is drawn and the picketing is enjoined.

We do not believe that this Court has intended to nullify its decisions according constitutional protection to peaceful organizational picketing. But the courts of many States are doing just that. We of course realize that the Court will decide only the case or cases before it; but we urge that it view the issues those cases present realistically in the context of what the state courts are doing generally.

In this brief we shall seek to demonstrate, first, that this Court has not overruled the principle that free speech encompasses organizational picketing; and, second, that the courts of many States have overruled that principle, sometimes even in theory and more often in practice. Finally, we shall suggest certain steps which we think

this court might appropriately take to safeguard this important right from state court subversion.

ARGUMENT

I

Freedom of Speech Includes Peaceful Picketing in Support of Union Organizing

A. The General Doctrine that Picketing is a Form of Speech.

As this Court said in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 293, 61 S. Ct. 552, 555, "Peaceful picketing is the workingman's means of communication." It is the natural way for workers to publicize the facts of a labor dispute. Picketing does not require heavy financial outlay, usually only a sign or placard or banner, and the pickets' contribution of their own time. It is the means by which workers can most easily reach those who may be in a position to give them support: the employers, the employees, and the customers of the enterprise involved. In the language of Justice Douglas, dissenting, in *Local Union No. 10* v. *Graham*, 345 U.S. 192, 202, 73 S. Ct. 585, 590, 591:

> "Picketing is a form of free speech—the workingman's method of giving publicity to the facts of industrial life."

The doctrine that the right to engage in peaceful picketing is protected by the constitutional guarantees of free speech and due process is thus of vital importance to workers and their unions.

The doctrine, however, is not of ancient origin. Like the even more basic right of workers to form unions,[1] it

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[1] *NLRB* v. *Jones & Laughlin S. Corp.*, 301 U.S. 1, 57 S. Ct. 615; *Thomas* v. *Collins*, 323 U.S. 516, 65 S. Ct. 315.

received recognition as constitutionally protected only within the last few decades, as a consequence of growing appreciation of the realities of industrial life. The earliest enunciation of the principle that peaceful picketing is a form of communication within the guarantees of free speech seems to be Justice Brandeis' well known dictum in *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 478, 57 S. Ct. 857, 862; and the leading cases are, of course, *Thornhill v. Alabama*, 310 U.S. 88, 60 S. Ct. 736, and *Carlson v. California*, 310 U.S. 106, 60 S. Ct. 746, decided the same day.

In the *Thornhill* case, the Court held invalid on its face an Alabama statute prohibiting picketing generally. The Court held that freedom of speech includes peaceful picketing; and it noted that (310 U.S. 88, 104, 60 S. Ct. 736, 745):

> "The range of activities proscribed by [the Alabama statute] * * * whether characterized as picketing or loitering or otherwise, embraces nearly every practicable, effective means whereby those interested—including the employees directly affected— may enlighten the public on the nature and causes of a labor dispute."

The Court ruled that picketing may not be prohibited simply because it may lead to action injurious to the picketed establishment. It said (310 U.S. 88, 104, 60 S. Ct. 736, 745):

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

The Court summarily rejected the argument that a State

may ban all picketing because of the inherent likelihood that it will give rise to breaches of the peace.[2]

The various interests which the State sought to protect by its ban on picketing must, the Court said, be weighed (310 U.S. at 105, 60 S. Ct. at 746)—

> "against the interest of the community and that of the individual in freedom of discussion on matters of public concern."

Finally, the Court quoted with approval (310 U.S. at 105-106, 60 S. Ct. at 746) the statement in *Schneider* v. *State*, 308 U.S. 147, 161, 60 S. Ct. 146, 150, that—

> "[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

The companion case decision in *Carlson* v. *California* is particularly interesting in connection with the present case because the anti-picketing ordinance there held invalid was sought to be sustained on what has come to be known as the unlawful purpose doctrine. The Court said (310 U.S. at 112, 60 S. Ct. at 749):

> "It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; * * *."

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[2] Similarly, the Court has repeatedly turned down the argument that leaflet distribution may be banned because it leads to littering of the streets. And cf. *Terminiello* v. *Chicago*, 337 U.S. 1, 69 S. Ct. 894.

B. Application of the Principle to Organizational Picketing.

The opinion in the *Thornhill* case states that the pickets were employees of the company picketed and that they were members of a union which represented most of the employees and was on strike. Those facts do not, however, appear to have been regarded as important to the result in the case; and in *AFL* v. *Swing*, 312 U.S. 321, 61 S. Ct. 568, the Court made it clear that the Constitution's protection of peaceful picketing is not restricted to disputes between an employer and his own employees. In that case (312 U.S. at 323, 61 S. Ct. at 569):

> "A union of those engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed."

The Illinois courts enjoined the picketing. They held that picketing is unlawful (312 U.S. at 324, 61 S. Ct. at 569):

> "when conducted by strangers to the employer (i.e., where there is not a proximate relation of employees and employer), * * *."

This Court reversed. It said (312 U.S. at 326, 61 S. Ct. at 570):

> "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council*, 257 U.S. 184, 209, 42 S. Ct. 72, 78. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

The right to engage in stranger picketing was again held to be constitutionally protected in *Bakery and Pastry Drivers, Etc.* v. *Wohl*, 315 U.S. 769, 62 S. Ct. 816. There the state ban on picketing was sought to be supported on the ground that no "labor dispute" was involved within the meaning of the New York statutes.[3] This Court reversed. It declared (315 U.S. at 774, 62 S. Ct. at 818):

> "one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

Accord: *Cafeteria Employees Union, Etc.* v. *Angelos*, 320 U.S. 293, 64 S. Ct. 126.

C. The Unlawful Purpose Doctrine in This Court.

In holding that picketing is constitutionally protected as free speech, this Court made it clear from the outset that it is only peaceful picketing that is so protected. See

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[3] Similar Wisconsin statutes (R. 23-24) barring all stranger picketing were applied by the trial judge in the present case. He said (R. 2):

> "The free speech issue as applied to picketing and the rule thereon as stated in the Thornhill case has lost most of its effectiveness by modification thereof in many more recent cases. It probably can be said that it is no longer the law."

However, the state Supreme Court in its first opinion declared that these Wisconsin statutes were invalid under the *Swing* and *Wohl* cases (R. 27); and even on rehearing the court declined to hold (R. 41)—

> "that the state may forbid peaceful picketing solely because there is no immediate employer-employee dispute as was held in the *Swing* case."

Carlson v. *California*, 310 U.S. 106, 113, 60 S. Ct. 746, 749. And the Court accordingly held that picketing loses its constitutional sanction if "set in a background of violence." *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U.S. 287, 294, 61 S. Ct. 552, 555. The Court also held, by a 5-4 vote, that a State may constitutionally bar picketing at an establishment physically remote and a different industry from that sought to be organized, though under common ownership. *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722, 62 S. Ct. 807.

More recently, in a series of cases the Court has developed the doctrine that picketing which seeks the attainment of an unlawful objective may constitutionally be prohibited. Since the way this doertnie has been applied is at issue in the present case, and since its application by other state courts, in our view, threatens the complete destruction of all constitutional protection for peaceful organizational picketing, we will examine these cases in some detail.

The first of these cases is *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684. In that case a unanimous Court, speaking through Mr. Justice Black, held that a Missouri court could constitutionally enjoin union ice peddlers from picketing an ice company in support of a demand that the company enter into an agreement with the union not to sell ice to non-union peddlers. The execution of such an agreement would have violated the Missouri anti-trust statute, and the Court held that since the picketing sought to induce illegal conduct, it could be enjoined.

It is quite clear that this decision was not intended to limit the general reach of the *Thornhill* or *Swing* cases. That the union had explicitly demanded that the employer enter into an illegal contract was admitted. Indeed, all of the other ice distributors in the city had been induced by the union to enter into such agreements. Further, the Court noted (336 U.S. at 502, 69 S. Ct. at 691):

> "The interest of Missouri in enforcement of its anti-trust laws cannot be classified as an effort to outlaw only a slight public inconvenience or annoyance."

The union's claim amounted to an assertion that it was entitled to induce a violation of the anti-trust laws so long as it did so through the medium of speech, i. e., picketing, and the Court rejected that claim.

We come then to *Hughes* v. *Superior Court*, 339 U.S. 460, 70 S. Ct. 718, and its companion cases. There, a Negro welfare association (not a union) demanded that a grocery store in hiring new employees select qualified Negroes until the percentage of employees was equal to the percentage of Negro trade. When the store owner refused, members of the organization picketed the store carrying placards truthfully stating the facts. The white employees continued to work, but some Negro customers were presumably persuaded to take their trade elsewhere. The California courts enjoined the picketing and this Court, in an opinion by Mr. Justice Frankfurter, affirmed.

In the view of this Court, the Supreme Court of California had (339 U.S. at 462, 70 S. Ct. at 720)——

> "held that the conceded purpose of the picketing in this case—to compel the hiring of Negroes in proportion to Negro customers—was unlawful even though pursued in a peaceful manner."

The Court said that States may believe that to permit picketing in support of proportionate hiring "would inevitably encourage use of picketing to compel employment on the basis of racial discrimination" and that "community tensions and conflicts would be exacerbated" (339 U.S. at 464; 70 S. Ct. at 721).

The Court said that it was "immaterial" that California's policy was judicially declared rather than enunciated by the legislature. Though the Court referred to *Thornhill*

and *Swing* with no intimation that it was limiting them, it also spoke of "the compulsive features inherent in picketing beyond the aspect of mere communication as an appeal to reason" (339 U.S. at 468, 70 S. Ct. at 723). The Court concluded (339 U.S. at 469, 70 S. Ct. at 723):

> "The injunction here was drawn to meet what California deemed the evil of picketing to bring about proportional hiring. We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts."

Three justices concurred specially, and Justice Douglas did not participate.

On the same day as the *Hughes* case, the Supreme Court also decided *Teamsters Union* v. *Hanke*, 339 U.S. 470, 70 S. Ct. 773, and *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532, 70 S. Ct. 784.

In the *Hanke* case, members of the union picketed two used car businesses in Seattle, conducted in each case by the owners themselves without employees. The purpose of the picketing was to induce the owners to comply, as respects night and holiday closing, with an agreement between the union and the local automobile dealers association. The trial court enjoined the picketing, and the Supreme Court of Washington affirmed. It asserted that the union's interests in the working conditions of a small number of members was far outweighed by the interests of the individual proprietors and the people of the community as a whole, "to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy." (339 U.S. at 477-478, 70 S. Ct. at 777).

This Court affirmed.

Justice Frankfurter, in an opinion concurred in by three other justices, enunciated substantially the same views ex-

pressed in the *Hughes* case. He said that the Court could not conclude that the State, in barring picketing for the purpose of unionizing self-employers (339 U.S. at 479, 70 S. Ct. at 778)—

> "has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice."

And he repeated the statement in the *Hughes* case that it was immaterial that the state policy was a judicially determined one.

As respects the *Swing*, *Wohl* and *Angelos* cases, Justice Frankfurter said (339 U.S. at 479-480, 70 S. Ct. at 778):

> "In those cases we held only that a State could not proscribe picketing merely by setting artificial bounds, unreal in the light of modern circumstances to what constitutes an industrial relationship or a labor dispute."

Justice Clark concurred in the result.

Justices Minton and Reed dissented on the ground that the picketing was neither in a context of violence, as in the *Meadowmoor* case, or for the purpose of inducing the person picketed to violate state law, as in the *Giboney* case. Therefore, they said, under the Thornhill line of decisions the picketing was protected by the Constitution. Justice Black likewise dissented, while Justice Douglas did not participate.

In the *Gazzam* case, the union sought to induce the employees of a hotel in the State of Washington to join the union and asked the employer to sign a union shop contract. Most, or all, of the employees declined to join the union, and the union thereupon commenced picketing. The pickets carried a sign reading: "Enetai Inn—Unfair to Organized Labor."

A Washington statute declared that employees should

be free from "interference, restraint, or coercion of employers in the" designation of a bargaining representative, and a state court enjoined the union (339 U.S. at 533, 70 S. Ct. at 785):

> "'from endeavoring to compel plaintiff to coerce his employees to join the defendant union or to designate defendant union as their representative for collective bargaining, by picketing the hotel premises of plaintiff * * *.'"

This Court unanimously affirmed. It took the view that since the picketing was in support of an unlawful objective the case was controlled by *Giboney* rather than by *Swing*.

Finally, we come to *Local Union No. 10* v. *Graham*, 345 U.S. 192, 73 S. Ct. 585. In that case various building trades unions took exception to the fact that a construction job was not 100 percent union, and there was testimony that they urged the principal contractor to cancel the contract of a subcontractor who was using non-union men. When the dispute was not resolved the unions commenced picketing, the pickets carrying a sign reading: "This Is Not A Union Job. Richmond Trades Council." The state trial court made no findings of fact, but recited in its decree enjoining the picketing that if was carried on for purposes and objectives illegal under the Virginia "right-to-work" law. The state supreme court affirmed without opinion.

This Court likewise affirmed. It said (345 U.S. at 197, 73 S. Ct. at 588):

> "In a case of this kind, we are justified in searching the record to determine whether the crucial finding by the state courts had a reasonable basis in the evidence."

Examining the record, the Court ruled that there was reasonable basis in the evidence for concluding that the picketing sought the discharge of non-union workmen.

Justice Douglas dissented. He said (345 U.S. at 204, 73 S. Ct. at 591):

> "If Virginia is to enjoin this form of free speech, I would require her to show precisely the reasons for it. Unless we are meticulous in that regard, great rights will be lost by the absence of findings, by the generality of findings, or by the vagueness of decrees."

Justice Black also dissented.

These opinions, beginning with *Hughes* and ending with *Graham* have, as we will show in Part II of this brief, led many state courts to the conclusion that organizational picketing no longer has constitutional protection, or not much. In Part III we will examine the factors in these opinions which have led, or enabled, the state courts to reach this result despite the fact that this Court did not in any of these decisions purport to overrule *Swing* or *Wohl*.

II

The Courts of Many States Are Denying All Constitutional Protection to Organizational Picketing

We have stated that the courts of many States are now, either in theory or in actual practice, denying all constitutional protection to organizational picketing. That this is so we will now endeavor to demonstrate. Our examination of state cases is meant to be illustrative rather than exhaustive; and it omits entirely those cases in which the purported justification for barring picketing is the *Meadowmoor* context of violence doctrine.

The state court decisions enjoining organizational picketing fall into two broad categories.

First, in a few States all organizational picketing is barred as a matter of law, either by judicial decision or under state statutes. Some courts in reaching or support-

ing this result have declared that organizational picketing is inherently coercive of the employees. Logically, such a doctrine might permit the barring of all picketing, including picketing for recognition by a union representing a majority of the employees, and even picketing during strikes over economic issues, but as far as we have discovered no court or legislature has yet gone that far.[4]

Secondly, and more usually, resort is had to the illegal purpose doctrine. This doctrine subdivides, in turn, into the issues of (1) what purposes are illegal, and (2) what, if any, proof of an illegal purpose is required.

A. The Doctrine That Organizational Picketing is Illegal as a Matter of Law.

The operation of this doctrine in the state courts is illustrated by *Pappas* v. *Stacey*, 151 Me. 36, 116 A. 2d 497, 36 LRRM 2619 (1955), appeal dismissed 350 U.S. 870, 76 S. Ct. 117. In that case, according to the agreed statement of facts, a union and three employees of a restaurant who had joined the union and were on strike, picketed the restaurant, "for the sole purpose of seeking to organize other employees."

The Maine Supreme Judicial Court held, first, that the strike of the three employees and the accompanying picketing were illegal because for the purpose of coercing the employer to join the union.[5]

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[4] The Louisiana Supreme Court has, however, barred picketing of sugar mills during the harvesting season, as a threat to the economy of the State: *Godchaux Sugars, Inc.* v. *Chaisson*, 227 La. 146, 78 So. 2d 673, 35 LRRM 2515 (1955).

[5] A Maine statute provides that workers shall have freedom to designate representatives of their own choosing for collective bargaining "free from interference, restraint, or coercion by their employers or other persons."

Many states have statutes of this general purport; and even in their absence the state courts usually hold that it is against public policy for an employer to make his employees join a union, except, in some states, pursuant to a valid union shop agreement.

The court held, secondly, and more broadly, that (36 LRRM 2621) "peaceful picketing for organizational purposes is unlawful under our law, and may be enjoined." The court declared that: "A coercive force is generated by the picketing to secure new members for the union." This coercion, the court said, operates not only through the employer (its first ground of decision), but directly upon the employees (36 LRRM 2621):

> "Irreparable damage to employer must in any appreciable period be like damage to the employee. The defendants say in substance to the twenty-seven nonunion workers 'join with us or we will continue to harm the business in which you are employed.'
>
> "The picketing is at least an act of interference with the employee in the exercise of his personal rights."

The Wisconsin statutes, which the court below first held unconstitutional (R. 22-27), and on rehearing passed over in favor of the unlawful purpose doctrine (R. 41),[6] prohibit

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[6] The opinion of the Wisconsin Supreme Court in the present case, on rehearing, discusses *Pappas* v. *Stacey* at some length, and states (R. 40):

> "It is worthy of note that an appeal was taken to the United States Supreme Court. There is no record of the Federal Court's action except an entry in its journal, as follows:
>
> 'The motion to dismiss is granted and the appeal is dismissed. Mr. Justice Black and Mr. Justice Douglas would note probable jurisdiction.'
>
> "It would appear from this entry that the court dismissed the appeal because no federal question was presented, suggesting that the court did not consider itself bound by the rule of the *Swing* case which, when this case was first studied by us, we considered as requiring reversal."

The court below nevertheless declined to uphold the state's statutory ban on stranger picketing, and chose instead to rest its decision on the unlawful purpose doctrine.

picketing except during a controversy between an employer and the majority of his employees (R. 23-24). Similar statutes have recently been held invalid by the courts of Oregon and Arizona: *Gilbertson* v. *Culinary Alliance*, 204 Ore. 326, 282 P. 2d 632, 36 LRRM 2001 (1955); *Shamrock* v. *Teamsters Local*, 36 LRRM 2748 (Ariz. Superior Ct., 1955). Earlier, the Supreme Court of Texas reached the same conclusion in *Operating Engineers* v. *Cox*, 148 Tex. 142, 219 S.W. 2d 787, 23 LRRM 2527 (1949).

In the Gilbertson case, however, the Oregon court upheld a state statute prohibiting "picketing for the purpose of compelling, intimidating, coercing or influencing an employee or any employer to join a labor organization." It distinguished *Swing* by quoting this Court's subsequent statement in *Gazzam*, that in Swing "this Court struck down the state's restraint of picketing solely upon the absence of an employer-employee relationship." Thus the Oregon court viewed *Swing* and *Wohl* as protecting minority picketing but not stranger picketing, although factually both *Swing* and *Wohl* involved the latter rather than the former.

In Ohio, organizational picketing seems to be banned outright by judicial decision. In each case the Ohio courts recite that the picketing is intended to coerce the employer to coerce his employees to join the union; but they appear to regard this proposition as an irrebutable conclusion of law rather than a question of fact.[7]

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[7] See *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 27 LRRM 2669 (Ohio Ct. App.) 164 O.S. 285, 130 N.E. 2d 237, pending on writ of certiorari, No. 41, this Term; *Anderson* v. *Retail Clerks Union*, 38 LRRM 2324, 2326 (Ohio Ct. App. 1956); *Richman Bros.* v. *Clothing Workers*, 132 N.E. 2d 769, 39 LRRM 2133 (Ohio Common Pleas 1956); *Chucales* v. *Royalty*, 164 O.S. 214, 129 N.E. 2d 823, 37 LRRM 2038 (1955).

B. The Unlawful Purpose Doctrine.

The decision below in the present case is itself a very good illustration of the current operation of the unlawful purpose doctrine in the state courts: The trial court found that "the purpose of the picketing was to induce the plaintiff's employees to organize and affiliate with defendant's [sic]" (R. 1, R. 16). It refused to find, as requested by the plaintiff, that the picketing was for the purpose of coercing the employer to coerce its employees to become members of the unions (R. 35). (However, the trial court enjoined the picketing under the Wisconsin statutes banning all stranger picketing.)

The state supreme court, on rehearing, reversed, on the ground that just this finding should have been made. The process by which the supreme court reaches this conclusion is as follows: the court notes, first, that the picketing was conducted (R. 35) "upon a rural highway at the entrance to a gravel pit where an exceedingly small number of possible or probable patrons of the owner's business might pass and be influenced by the Union's [sic] banner, * * *." Obviously, therefore, the Court said (R. 36) "the message carried by the pickets could not have been intended for the guidance of the community."[8]

The court likewise decided (R. 36) that the message carried upon the unions' banner could not have been intended for the enlightenment of the employees because they had already been asked to join the unions and had refused.

Having disposed of these two possibilities, the court said that (R. 36) "it is clear to us" that the only purpose of the picketing was to influence truck drivers to refuse to make

[8] Had the picketing been conducted anywhere other than at the entrance to the gravel pit, the court below presumably could have enjoined it on authority of the *Ritter's Cafe* case.

deliveries in the hope of coercing the employer to coerce its employees to join the unions.

The dissenting judge likewise seemed to think that the validity of the picketing should be determined according to the court's guess as to its purpose. He likewise drew (R. 43) "a reasonable inference" that since the picketing was rural it was not aimed at the general public. However, of what he conceived to be "the two remaining conceivable objectives" (i.e., an attempt to induce the employees to join the unions, or to coerce the employer to coerce the employees), he felt that the former was the more likely.

We do not believe that detailed descriptions of the innumerable other state court cases enjoining organizational picketing would be helpful. Instead, we will enumerate some of the factual circumstances which have been recited by the courts in organizational picketing cases as supporting the inference drawn by the court that the purpose of the picketing was to coerce the employer to coerce the employees to join the union. Except as otherwise noted, all of the cases below are organizational picketing cases, in which no demand of any sort had been made on the employer by the union.

Circumstances from which courts have inferred that picketing seeks to coerce the employees to join the union:

1. That the pickets are strangers.

As shown, supra pp. 14-16, the courts of various States, such as Maine and Ohio, view stranger picketing as coercive and illegal *per se*. See also *Spokane Building and Construction Trades Council* v. *Audubon Homes, Inc.*, 149 Wash. 144, 298 P. 2d 1112, pending on petition for certiorari, No. —, this Term.

2. That the pickets are *not* strangers, but employees.

Pappas v. *Stacey*, 151 Me. 36, 116 A. 2d 497, 36 LRRM 2619 (1955), appeal dismissed 350 U.S. 870, 76 S. Ct. 117.

3. That the picketing takes place at the site of the enterprise sought to be organized.

This was regarded as a telling circumstance by the Supreme Court of Wisconsin in the present case; and also by the Missouri Supreme Court in *Bellerive Country Club* v. *McVey*, 284 S.W. 2d 492, 36 LRRM 2282 (1955). In the latter case, the picketing took place at the entrance to a country club sought to be organized, and the fact that it was in a rural area was regarded by the Missouri court as a circumstance pointing to an intention to coerce the employer rather than to appeal to the general public.

4. That the picketing does *not* take place at the site of the enterprise sought to be organized.

In *Ritter's Cafe*, supra p. 8, this circumstance was regarded as supporting the constitutionality of the ban on picketing by the Texas state courts, and picketing other than at the site is very generally frowned on. For example, the Supreme Court of Arkansas bans picketing away from the site of the enterprise both for organizing purposes (*IBEW* v. *Broadmoor Builders, Inc.*, 280 S.W. 2d 898, 36 LRRM 2499) and during a strike over economic issues (*Teamsters Union* v. *Blessingame*, 293 S.W. 2d 444, 38 LRRM 2351, pending on petition for certiorari, No. 546, this Term).

5. That the employees were solicited by the union prior to the picketing.

This circumstance was regarded as supporting the inference that the unioin's purpose was to coerce, both by the court below in the present case and by the Washington Supreme Court in *Spokane Building and Construction Trades Council* v. *Audubon Homes, Inc.*, supra p. 20.

6. That the employees were *not* solicited by the union prior to the picketing.

This circumstance was regarded as invidious in: *Bellerive Country Club* v. *McVey*, supra p. 20; *Baderak* v. *Building Trades Council*, 112 A. 2d 170, 35 LRRM 2623, (Pa. Sup. Ct. 1955); *Teamsters Union* v. *Merchandise Co.*, 37 LRRM 2819 (Ind. App. 1956). (In the last case the court employs "no labor dispute" rather than "unlawful purpose" terminology.)

7. That the enterprise is *not* a commercial one:

Bellerive Country Club v. McVey, supra.

8. That the enterprise is a commercial one.

While this is not often explicitly stressed, it seems to be implicit in many of the cases that the fact that the employer is engaged in a commercial enterprise and will suffer financial loss and competitive disadvantage from the picketing is a circumstance pointing to a purpose to coerce the employer. See, e.g., *Pappas* v. *Stacey; Spokane Building and Construction Trades Council* v. *Audubon Homes, Inc.*

Some courts hold that if organizational picketing goes on for an unreasonable length of time, it may be inferred that it has an improper purpose. *Anchorage, Inc.* v. *Waiters Union*, 283 Pa. 547, 119 A. 2d 199, 37 LRRM 2288 (1956); *Hammer* v. *Textile Workers*, 111 A. 2d 308, 34 LRRM 2812 (N.J. S. Ct. 1954). Contra: *Wood* v. *O'Grady*, 307 N.Y. 522, 122 N.E. 2d 386, 35 LRRM 2028 (1954).

While a design to coerce the employer to coerce his employees to join the union is the unlawful purpose most usually inferred for banning organizational picketing, in some cases the courts have, instead or in addition or alternately, inferred an unlawful purpose to destroy the plain-

tiff's business.[9] *Hammer* v. *Textile Workers*, supra; *Spokane Building and Construction Trades Council* v. *Audubon Homes, Inc.*, supra. In the latter case, the Court said:

> "It is not clear, from the record, whether the ultimate purpose of the picketing was to coerce plaintiff into having its employees join a union, or, since defendants had not even approached plaintiff, to cut off plaintiff's building materials and thus force plaintiff's business to die on the vine. In either event, the picketing was coercive and unlawful."

We do not want to leave the impression that all of the courts in all of the States always ban organizational picketing by inferring a union purpose to coerce the employer to coerce his employees to join the union, or some other unlawful purpose. While that is what happens in some States, in others, such as New York, the courts sometimes, or even usually, refuse to infer an unlawful purpose from the bare fact of organizational picketing.[10] The state of

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[9] Conversely, it has been held unlawful for a union to strike for the purpose of compelling the employer to remain in business at a particular location. *Anheuser-Busch, Inc.* v. *Brewery Workers*, 286 N.Y. S. Ct. 832, 35 LRRM 2740 (1955).

[10] Refusal to draw inference that union's object is to coerce employer to compel employees to join the union: *Wood* v. *O'Grady*, 307 N.Y. 522, 122 N.E. 2d 386, 35 LRRM 2028 (1954); *Grubman* v. *Harlem Labor Union*, 36 LRRM 2245 (N.Y. S. Ct. 1955); *Ringling Bros.* v. *Lewis*, 152 N.Y. S. 2d 835, 37 LRRM 2810 (N.Y. S. Ct. 1956); *Englert* v. *Durst*, 37 LRRM 2306 (N.Y. S. Ct. 1955); *Autrino* v. *Sexton*, 36 LRRM 2129 (N.Y. S. Ct. 1955); *Skinner* v. *Carpenters Union*; 36 LRRM 2468 (Colo. Dist. Ct. 1955); *Simmons* v. *Retail Clerks Assn.*, 5 Ill. App. 2d 429, 125 N.E. 2d 700, 36 LRRM 2144 (1955); *Wilkes Sportswear, Inc.* v. *Ladies' Garment Workers*, 380 Pa. 164, 110 A. 2d 418, 35 LRRM 2298 (1955); *Amore* v. *Building Trades Council*, 39 LRRM 2153 (Pa. Common Pleas, 1956); *Lindsey Tavern* v. *Restaurant Employees*, 125 A. 2d 207, 38 LRRM 2770 (R.I. S. Ct. 1956).

the law is thus summed up by the Missouri Supreme Court in *Bellerive Country Club* v. *McVey*, supra (36 LRRM at 2289):

> "We have examined the many cases and other authorities cited by the parties. * * * We should be less than frank were we to profess to understand all of them or were we to contend that they are readily, if at all, reconcilable."

What is clear is that many state courts no longer feel that organizational picketing enjoys any constitutional protection. They feel that they are quite free to enjoin it if otherwise disposed so to do.

III

The Constitutional Principles Governing Organizational Picketing

We think it is clear (1) that this Court has never meant to withdraw all constitutional protection from organizational picketing, and (2) that many state courts have nevertheless taken this Court's decisions in *Hughes* and its companion cases as meaning just that, either in theory or in practice. We therefore respectfully suggest that the Court may wish to clarify some of the things that were said in those decisions.

1. A phrase employed in the *Hughes* case—"the compulsive features inherent in picketing"—has been taken by some to mean that picketing is not a legitimate means of communication, but inherently coercive. Thus some state courts have relied on the supposed "coercive" aspect of picketing to support bans on all organizational picketing.

We do not, of course, believe that the Court intended that any such far reaching inferences be drawn from its

probably casual employment of this phrase in the *Hughes* opinion.

2. It is no doubt true, as far as this Court is concerned, that the validity of a state substantive policy does not in general depend on whether it is judicially or legislatively articulated. We suggest, however, that where the question is of balancing the interest of a State in implementing a substantive policy against the policy of the federal Constitution to preserve freedom of speech, a policy deliberately declared by a state legislature should be entitled to greater weight than a policy judicially enunciated.

Further, in both the *Hughes* and *Hanke* cases the asserted state policy to which this Court accorded such respect was first discerned by the state courts in those very cases—and for the purpose of banning picketing. As suggested by the Court's final sentence in the *Hughes* opinion, the evil perceived by the California courts was "picketing to bring about proportional hiring" and not proportional hiring itself. Similarly in the *Hanke* case the evil discerned by the Washington courts was picketing to induce self-employed persons to comply with union standards as to night and holiday closing, rather than such closing itself. If state courts are permitted to ban picketing on the basis of a state policy which exists for no purpose other than banning picketing, the right to picket has, as a practical matter, lost much of its constitutional sanction.

3. The Court has, quite understandably, tended to shy away from laying down general rules, and to assert that in each case the interest of the state in effectuating its substantive policy must be balanced against the restriction on free communication involved in banning picketing. Typical of this approach is the assertion in the *Hughes* case that (339 U.S. at 469, 70 S. Ct. at 723) "we do not go beyond

the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts." The fact nevertheless remains that in the absence of easily understood general principles uniformly applied by this Court, the state equity trial courts, with their traditional concern for the protection of property, and their tendency to issue temporary injunctions pending final decision, normally resolve all doubtful issues against picketing.

4. The State courts are exercising an unfettered discretion to infer an unlawful union purpose from the bare fact of picketing. We do not think that this practice is sanctioned by any decision or even language of this Court.

Where, as in the *Giboney* or *Gazzam* cases, the union is picketing in support of a specific demand with which the employer could not lawfully comply under a valid state law, we think no exception can be taken to the conclusion that the picketing may constitutionally be forbidden. The right of free speech is always subject to the limitation that speech may not seek to induce illegal conduct, and of course we do not suggest that picketing is entitled to greater protection than other forms of speech. The secondary boycott provisions of the Taft-Hartley Act, for example, are written on the assumption that picketing which seeks to induce conduct of the sorts prohibited by those sections may constitutionally be forbidden,[11] and we do not quarrel with that assumption, though we disagree with the congressional judgment as to what types of conduct should be forbidden.

If, however, picketing is to be banned because for an illegal purpose, we submit that this Court should require (1) that the trial court specifically find that the picketing was for a specific illegal purpose, and (2) that the

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[11] See *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694, 705, 71 S. Ct. 954, 960.

finding be supported by the clear weight of the evidence, and not simply by an inference drawn by the trial courts, or, as here, the appellate state court.

There are any number of inferences as to the union's purpose which might conceivably be drawn simply from the bare fact that it is picketing an unorganized plant. Among them are:

1. That the union is appealing to the employees in the plant to join the union.

2. That the union is appealing to the employer—

   a. To make lawful suggestions to its employees with respect to joining the union. Such statements might run the gamut from a bare statement by the employer that it would not fire the employees for joining a union to a statement that it believed in unions and thought that the employees should join. Under the Constitution and the National Labor Relations Act. (Section 8(c)) an employer has broad rights to express its views on unionism to its employees, so long as it does not engage in threats of reprisal or promises of benefit; or

   b. To coerce the employees to join the union; or

   c. To recognize the union if a majority of employees join; or

   d. To recognize the union regardless of the wishes of the employees.

3. That the union is appealing to the general public, or to other employers—

   a. To intervene on its behalf with the picketed employer; or

   b. To refuse to deal with the picketed employer.

4. That the union is appealing to employees of other employers, such as drivers of delivery trucks—

   a. That they urge the employees of the picketed plant to join a union; or

   b. That they refuse to make deliveries.

The list of possible inferences as to the union's purpose might be added to almost indefinitely. Cf. *Thornhill* v. *Alabama*, 310 U.S. 88, 101, 60 S. Ct. 736, 743, footnote 18. Some of these inferred purposes are lawful, some unlawful. If the state courts are given carte blanche to choose among them, not on the basis of evidence in the record but simply according to their own predilections, the vital constitutional right to organize through peaceful picketing will continue to be denied, and in the very jurisdictions where workers and unions have most need of it.

CONCLUSION

For the reasons stated, we respectfully submit that the decision of the Supreme Court of Wisconsin should be reversed.

J. Albert Woll
General Counsel
736 Bowen Building
815 Fifteenth Street, N.W.
Washington 5, D. C.

Thomas E. Harris
Associate General Counsel
815 Sixteenth Street, N.W.
Washington 6, D. C.